United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2282

United States Court of Appeals

FOR THE SECOND CIRCUIT

THOMAS A. VINCEL, GRACE VINCEL, NUNO TARDO, IRENE TARDO, WILLIAM BREEN, VIRGINIA BREEN, JOSEPH RUMMO, ROLF HOEGER, M. D. AIELLO, P. AIELLO, & LIRCO CREDIT CORPORATION,

Plaintiffs-Appellants,

—against—

WHITE MOTOR CORPORATION & GLENN F. KOMMER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLANTS

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Preliminary Statement

This is an appeal by the plaintiffs from a final judgment of the United States District Court for the Eastern District of New York granting a motion of the defendants for summary judgment, and dismissing the action on the merits. The judgment was filed on August 26, 1974, (424A)* pursuant to a memorandum and order

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* References to pages of the Appendix are hereinafter designated as (-A).

dated August 23, 1974, of Hon. John F. Dooling, Jr., District Judge. (386A) Judge Dooling's memorandum and order, and his prior memorandum and order in the case dated August 2, 1972, (154A) have not been officially reported.

The complaint herein was filed on June 27, 1969. The plaintiffs claimed damages in the amount of $3 million based upon alleged violations by the two defendants of their contractual, fiduciary, and statutory obligations to the plaintiffs. (7A)

The fourth cause of action (of the six set forth in the complaint) charged that the defendants' acts violating their obligations to the plaintiffs under the anti-trust laws, had been performed pursuant to a conspiracy to drive Reo and Diamond Reo truck dealers out of business for the benefit of White Motor Corporation ("White Motor"). (17A) The defendants moved for an order dismissing the fourth cause of action, (153A) and that motion was granted by the district court's memorandum and order dated August 2, 1972. (154A)

The plaintiffs moved for an order permitting them to serve the amended complaint annexed to the notice of motion. (227A) The defendants then moved for summary judgment on all the causes of action alleged in the complaint or in the proposed amended complaint. (251A) The district court's memorandum and order dated

August 23, 1974, grants both motions, and dismisses the plaintiffs' action on the merits. (420A-421A)

The appellants contend that the memoranda and orders of the district court reflect an erroneous concept of the basic relationship between the plaintiffs and the defendants at the time of the acts complained of. Those acts involved the assumption by the defendants of control over, and the management of, Long Island Diamond Reo Truck Co., Inc. ("Long Island Reo"), followed by defendants causing Long Island Reo to default on certain obligations to White Motor, and using the defaults the defendants themselves had caused as a pretext for seizing the assets of Long Island Reo, terminating its business, and compelling its liquidation. The defendants had incurred fiduciary and statutory obligations to all the plaintiffs by their assumption of management and control, as well as the contractual and fiduciary obligations set forth in the agreements they executed with some of the plaintiffs.

In the bankruptcy of Long Island Reo that resulted, the bankruptcy trustee's assertion of charges against White Motor led to White Motor's release of all its claims as a creditor, and payment of $100,000 to the bankruptcy trustee, so that the other unsecured creditors received approximately 70% of their claims as allowed. (300A) The stockholders, who are the plaintiffs herein, received nothing. Their claims against the defendants were not before the bankruptcy court, and they did not consent to the

settlement between White Motor and the bankruptcy trustee. (301A, 385A) The appellants contend that the memoranda and orders of the district court reflect an erroneous concept of the authority of the bankruptcy trustee to bind stockholders, and of the effect on stockholders of his compromise of claims that he asserted on behalf of the estate and the creditors he represented.

Finally the appellants contend that three of the plaintiffs, as well as Long Island Reo, were automobile dealers as that term is defined in the Automobile Dealers' Franchise Act (15 U.S.C. §§1221-1225) and in Section 197 of the New York General Business Law, and that the district court's 1974 memorandum and decision err in holding that only the corporation was a dealer.

Questions Presented

1. Whether the plaintiffs are entitled to a trial of their claims that the defendants violated their fiduciary, contractual and statutory obligations to the plaintiffs by assuming the management and control of Long Island Reo, by then causing Long Island Reo to default on certain obligations to White Motor, and by using the defaults they had caused as a pretext for seizing the assets of Long Island Reo, terminating its business, and compelling its liquidation.

2. Whether the claims asserted in this proceeding by the plaintiffs survived the bankruptcy proceeding in which similar claims were asserted by the bankruptcy trustee on behalf of the estate and the creditors he represented, and were compromised by White Motor and the bankruptcy trustee, without the consent of or any benefit to stockholders.

3. Whether plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen, as well as Long Island Reo, were "automobile dealers" within the meaning of the Automobile Dealers' Franchise Act (15 U.S.C. §§1221-1225), were "Distributors" and "Dealers" within the meaning of Section 197 of the General Business Law of the State of New York

The appellants contend that each of those questions should be answered in the affirmative.

Jurisdiction of the Court Below

The jurisdiction of the court below is founded upon diversity of citizenship pursuant to 28 U.S.C. §1332, and upon the alleged violations by the defendants of the Automobile Dealers' Franchise Act, 15 U.S.C. §§1221-1225.

Statement of Facts

The acts of the defendants complained of occurred during the years 1966 and 1967. The amended complaint, (228A) supplemented

by the motion papers and answers to interrogatories, sets forth the following facts:

The eleven plaintiffs (and defendant Kommer after December 29, 1966) were the stockholders of Long Island Reo. At the time of the acts complained of, six of the plaintiffs were also employees of Long Island Reo, and three of the six were officers. Thomas A. Vincel was the president, Nuno Tardo was the secretary, and William Breen was the vice president of Long Island Reo. (228A-232A) Those three plaintiffs were also the directors and (with Samuel Antelis after February 6, 1967) the executive employees of Long Island Reo. (237A-238A)

Prior to the transfer of their voting stock of Long Island Reo to defendant Kommer on December 29, 1966, plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen were the principal stockholders of Long Island Reo, owning 85% of the voting stock and 88% of the non-voting stock. (228A-229A)

The sole business activity of Long Island Reo was the sale and servicing of Reo trucks and Diamond Reo trucks manufactured by defendant White Motor, in Queens, Nassau, and Suffolk Counties. (232A) In 1959 plaintiffs Thomas A. Vincel and Nuno Tardo (with one Henry Lanz), as partners, began that business pursuant to a franchise agreement between the partners and the

Reo Motor Truck division of White Motor. (281A)

In 1960 the three partners organized Long Island Reo as a corporation to take over the partnership franchises and business. Beginning in January 1961, Long Island Reo made a series of franchise agreements first with the Reo Motor Truck division of White Motor, and then with the Diamond Reo Truck division of White Motor. (281A)

Henry Lanz left the business in 1964 and was succeeded by William Breen as a principal stockholder, officer, and director of Long Island Reo. Small amounts of stock were issued and sold for cash from time to time, at $1,000 per share, to plaintiffs Grace Vincel, Irene Tardo, and Virginia Breen, the wives of the three principal stockholders; to three of the employees of Long Island Reo (plaintiffs Joseph Rummo, Rolf Hoeger,and P. Aiello), to plaintiff M. D. Aiello (P. Aiello's wife), and to plaintiff LIRCO (an affiliated corporation). (282A, 443A-445A)

The business expanded from a modest beginning in 1959, so that by 1962 Long Island Reo was the second largest distributor anywhere of Reo trucks. (281A-282A, 304A-306A) It was the sole business activity of plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen. Annual sales had increased to approximately $3 million per year by 1966. (302A, 510A)

Although the franchise agreements of White Motor with the partners, and then with Long Island Reo, were in some respects exclusive, White Motor was at the same time selling and servicing White trucks, and servicing Reo and Diamond Reo trucks in the same territory in competition with Long Island Reo. (244A-245A, 290A, 292A-293A, 307A)

White Motor had acquired the assets of Reo Motors, Inc., one of its competitors, in 1957, and the assets of Diamond T Motor Truck Co., another of its competitors, in 1958. (259A) White Motor continued for some time to manufacture and sell Reo trucks and Diamond T trucks through divisions of White Motor located in Lansing, Michigan, and to provide for the sale and servicing of such trucks in various areas through franchise agreements with automobile dealers including plaintiffs Thomas A. Vincel and Nuno Tardo, and Long Island Reo. White Motor also continued, and continues today, to manufacture White trucks, and to sell them directly through branches and also through other dealers.

In or about 1966 the defendants and others entered into a conspiracy to drive out of business, for the benefit of White Motor, the major dealers (including plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen, and Long Island Reo) who sold only Reo trucks, or Diamond T trucks, and then Diamond Reo trucks. (243A-246A)

Beginning in or about November 1966, the defendants planned and conspired to acquire the management and control of Long Island Reo and its financial affairs, to destroy the working capital of Long Island Reo, to acquire the assets of Long Island Reo, to drive Long Island Reo out of business, and to injure Long Island Reo's shareholders, officers and employees. (234A)

In November 1966 indebtedness theretofore incurred by Long Island Reo for the conduct of its business, and defaults thereon, enabled White Motor to step in as the major creditor of Long Island Reo, secured by liens on the property of Long Island Reo. White Motor threatened foreclosure of the liens, asserted claims directly against plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen, and compelled them to turn over control of Long Island Reo to White Motor and to Kommer, an employee and designee of White Motor.

On or about November 2, 1966, White Motor, asserting its alleged rights as creditor and lienor, took physical possession of the Long Island Reo plant, trucks, cash, mail, records, motor vehicle title books, and other assets. White Motor's attorney threatened to have plaintiffs Thomas A. Vincel and Nuno Tardo arrested and criminally prosecuted unless they and Long Island Reo would agree to a termination of Long Island Reo's franchise

to sell and service Diamond Reo trucks. Following a series of meetings, accusations, and threats, a Financing Agreement dated November 23, 1966, was signed by White Motor and, under duress, by plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen, and by Long Island Reo. (285A-288A)

The Financing Agreement required those three plaintiffs to transfer to defendant Kommer, an employee of White Motor, all the shares of voting stock owned by them and by their families in Long Island Reo and in four affiliated corporations, pursuant to a voting trust agreement. It required plaintiff Thomas A. Vincel to guarantee a secured 6-1/2% note of Long Island Reo to White Motor in the principal amount of $195,837.50. It required Long Island Reo to pay cash on delivery for all parts ordered from White Motor, and to pay in cash, or by check of a financial institution or a retail customer, for each truck sold upon delivery of the truck by White Motor's Regional Representative (who was later designated by Kommer to serve also as the General Manager of Long Island Reo) to the retail customer. (24A-38A, 235A, 287A-288A)

Thereafter the Voting Trust Agreement dated December 29, 1966, referred to in the Financing Agreement, was executed by those three plaintiffs (and by the voting stockholders of the four affiliated corporations) as Signatories, and by Kommer as the Trustee.

The Voting Trust Agreement required plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen to turn over to Kommer as trustee, and to anyone subsequently designated by White Motor as a successor trustee, both the control and the management of Long Island Reo. It required them to transfer to Kommer all their shares (85%) of the voting stock of Long Island Reo, in exchange for voting trust certificates that Kommer would issue. It required the voting stockholders of the four affiliated corporations to transfer all their shares to Kommer, also in exchange for voting trust certificates. It provided that Kommer would have the exclusive right to vote the shares. (41A-69A, 235A-237A, 288A-289A)

In addition, the Voting Trust Agreement gave Kommer the right to cause the Long Island Reo Board of Directors to appoint a person acceptable to him to act as the General Manager of Long Island Reo. The General Manager's salary was to be paid by Kommer (for White Motor), with Long Island Reo reimbursing Kommer for the amount paid up to $8,400 per annum. The Voting Trust Agreement expressly permits Kommer, any General Manager of Long Island Reo whom he might designate, and any successor trustee to be an employee, officer, or director of White Motor. (44A, 47A)

In the Voting Trust Agreement, Kommer agreed that he would not cause Long Island Reo to be dissolved, or totally

liquidated, or partially liquidated without having received the prior written consent of the signatories. Kommer as trustee was exempted by the Voting Trust Agreement from certain liabilities, but not "for such loss or damage as the Voting Trust Certificate holders may suffer by reason of his willful misfeasance or gross negligence". (47A) Kommer acted throughout as White Motor's employee, designated, dominated, and controlled by White Motor.

Pursuant to the Voting Trust Agreement, plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen transferred to Kommer all their shares of the voting stock of Long Island Reo in exchange for voting trust certificates. (236A-237A)

In February 1967 White Motor and Kommer, already in control of Long Island Reo, also took over the management of Long Island Reo. Pursuant to the Voting Trust Agreement, Kommer caused the Long Island Reo board of directors to appoint one Samuel S. Antelis as the General Manager of Long Island Reo.

Antelis took charge of the business of Long Island Reo, and served simultaneously as the Regional Representative of White Motor referred to in the Financing Agreement. His salary was paid by Kommer out of funds supplied by White Motor. Antelis was in charge, among other things, of ordering trucks for Long Island Reo from the factory of White Motor, of confirming the receipt of trucks

from White Motor and of deposits from purchasers of the trucks, and of running the accounting and bookkeeping departments, the bank accounts, and the other financial affairs of Long Island Reo. As the Regional Representative of White Motor, Antelis received the trucks that he ordered as the General Manager of Long Island Reo, so that White Motor would retain title to and possession of each truck until it was delivered to a retail customer of Long Island Reo against payment in full to White Motor. (237A-238A, 289A-290A, 490A)

Plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen continued to work under Antelis on the sale and servicing of Diamond Reo trucks. They were, however, no longer in control of the corporation or managing its business. The defendants, directly and through Antelis, had acquired management as well as control of Long Island Reo. The resumption of management and control by the plaintiffs was conditioned upon full payment by Long Island Reo of the 6-1/2% note in the principal amount of $195,837.50 guaranteed by Thomas A. Vincel, and of another note of Long Island Reo to White Motor on which the principal balance was $18,180 on the date of the Financing Agreement, and upon Long Island Reo's satisfaction of all its obligations to White Motor as the assignee of obligations that had been owed to C.I.T. Credit Corporation. (46A)

During the nine months December 1966 - August 1967, Long Island Reo sold 65 new Diamond Reo trucks, and paid White Motor approximately $87,500 on account of the obligations set forth in the Financing Agreement. During the eight months January - August 1967, 62 of those trucks were sold, resulting in payments of approximately $789,000 for trucks and parts by Long Island Reo to White Motor. (291A) In February 1967, a demand note in the principal amount of $42,739.56 to White Motor was executed by Long Island Reo and guaranteed by plaintiff Thomas A. Vincel.

By August 1967 White Motor had arranged for the production of Diamond Reo trucks with the name White, instead of Diamond Reo, on the radiator grill, and for the marketing of such trucks by White Motor branches and dealers, including the branch of White Motor that was operating in competition with Long Island Reo. (307A) That enabled the defendants to put Long Island Reo out of business with a minimal loss of revenue from the sale of trucks and parts, a maximum transfer of the business of Long Island Reo to White Motor.

Apart from their management of Long Island Reo through Antelis, the defendants caused a continuing and growing drain on the cash and working capital of Long Island Reo by failing to honor valid warranty claims upon trucks repaired and serviced by Long Island Reo, by refusing normal allowance of credit,

refunds on defective parts delivered, and standard services to customers of Long Island Reo, by making pedigree information on trucks sold by Long Island Reo available to representatives of White Motor competing with Long Island Reo, by making factory sales to potential customers of Long Island Reo at discounts below the prices charged to Long Island Reo, and by destroying a $75,000 parts inventory financing program of Long Island Reo negotiated by plaintiff Thomas A. Vincel with a field warehousing company and a bank pursuant to the Financing Agreement. Through Antelis, the defendants caused Long Island Reo to overdraw its bank accounts and to overpay certain creditors, and generally the defendants prevented Long Island Reo from meeting its contractual obligations to White Motor, to other creditors of Long Island Reo, and to customers of Long Island Reo. (291A-294A)

In August 1967 the defendants used the defaults on obligations of Long Island Reo to White Motor that they had caused as the pretext for taking over the trucks and other property of Long Island Reo, cancelling the franchise and terminating the business and compelling the liquidation of Long Island Reo. (294A-297A)

The method used was the institution by the defendants, on August 25, 1967, of an action in the New York State Supreme Court for the replevin of motor vehicles alleged in the complaint to have a value of $351,449.27, and for additional damages in the

amount of $227,675.36. The complaint, verified by Kommer, named White Motor as the plaintiff and Long Island Reo as the defendant. (128A, 135A) An amended complaint dated September 1, 1967, brought in Vincel as a defendant and demanded judgment against him in the amount of $153,033.71. (143A)

Based upon an affidavit of Kommer dated August 28, 1967, (136A) applying for an order of attachment in the State court proceeding, the defendants obtained an ex parte order of attachment, (141A) used to accomplish the physical seizure of Long Island Reo's property by the sheriff, the termination of Long Island Reo's business, and the liquidation of Long Island Reo. Kommer, still holding 85% of the voting stock of Long Island Reo as trustee for plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen, had been designated by the Executive Vice President of White Motor on August 24, 1967, "as a person to execute court pleadings and all instruments necessary and related to the obtaining of surety bonds in connection with court proceedings of whatever form against Long Island Reo Truck Co., Inc." (140A)

Counterclaims were asserted in the State court action by Long Island Reo and Thomas A. Vincel bringing in Kommer as a cross-defendant, and alleging the wrongdoing of White Motor and Kommer that had deprived Long Island Reo of its assets, cancelled

its franchises, and terminated its business. (99A)

On December 21, 1967, Long Island Reo filed a petition pursuant to Chapters I - VII of the Bankruptcy Act and the General Orders in Bankruptcy then in effect, instituting a Proceeding in Bankruptcy (not a proceeding for reorganization or for an arrangement). (75A) In the bankruptcy proceeding White Motor filed claims as a creditor amounting to $323,610.14. The trustee in bankruptcy asserted a defense and counterclaim against White Motor based upon the claims that had previously been asserted by Long Island Reo and by Thomas A. Vincel against White Motor and against Kommer. (88A) The defense and counterclaim of the bankruptcy trustee were compromised in the bankruptcy proceeding by White Motor's abandonment of its claims as a creditor, and by White Motor's payment of $100,000 to the estate. (92A) As a result, the estate was able to and did pay all administration expenses including $36,722.06 to the trustee and to counsel for the trustee, $3,879.38 (100%) to preferred creditors, and $95,692 (approximately 70%) on the claims of unsecured creditors. (300A-301A)

The stockholders of Long Island Reo did not consent to the settlement, and did not receive any distribution. No claims had been asserted on behalf of any of them against White Motor or Kommer, except for the claim asserted by Thomas A. Vincel

in the State court proceeding. The order of the bankruptcy court, approving the compromise and the execution and filing of a stipulation of discontinuance of the State court proceeding by the bankruptcy trustee and White Motor, provides (93A):

> "However, said stipulation shall not in any way affect the action of White Motor Corporation against Thomas A. Vincel and Thomas A. Vincel's defenses and counterclaims to said action."

The stipulation between the attorneys for the bankruptcy trustee and for White Motor and Kommer provides for discontinuance with prejudice as between them, and expressly preserves the rights of White Motor and Vincel against each other. (117A) The stipulation between White Motor and Vincel provides for discontinuance without prejudice. (385A)

Thereafter this action was instituted by the plaintiffs against White Motor and Kommer. The defendants' motion for summary judgment was granted primarily on the theory that all claims of the plaintiffs against both defendants were somehow wiped out by the compromise among creditors of Long Island Reo approved in the bankruptcy proceeding.

POINT I

The plaintiffs are entitled to a trial of their claims that the defendants willfully violated their contractual, fiduciary, and statutory obligations to the plaintiffs.

The amended complaint alleges that the defendants violated contractual obligations to the plaintiffs pursuant to the Financing Agreement and the Voting Trust Agreement; that the defendants violated fiduciary obligations to the plaintiffs arising in part from the defendants' assumption of management and control of Long Island Reo, and in part from the terms of the two agreements; and that the defendants violated statutory obligations to the plaintiffs pursuant to the anti-trust laws, the Automobile Dealers' Franchise Act, and Section 197 of the General Business Law of the State of New York. It alleges that the plaintiffs were damaged by these acts of the defendants in the amount of $3 million.

The defendants also violated their contractual, fiduciary, and statutory obligations to Long Island Reo. Long Island Reo was a party to the Financing Agreement. (23A) It was also a party to the Voting Trust Agreement, but only as a stockholder of affiliated corporations. (39A) Plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen were parties to both agreements and were (with the voting trustee) the principal

parties to the Voting Trust Agreement. (23A, 39A, 49A-50A) Plaintiffs Irene Tardo and Virginia Breen, as holders of voting stock of affiliated corporations, were parties to the Voting Trust Agreement. (39A, 50A)

The contractual obligations of White Motor under the Financing Agreement, and of both defendants under the Voting Trust Agreement, run directly to plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen as promisees, and also run to the other plaintiffs as third-party beneficiaries. The fiduciary obligations of both defendants under the Voting Trust Agreement run directly to plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen, as express cestuis que trustent, and to the other plaintiffs as implied cestuis que trustent. The fiduciary obligations of the defendants that arose from their assumption of the management and control of Long Island Reo run to all the plaintiffs.

The defendants cannot plausibly contend that they did no wrong when they seized the assets of Long Island Reo, put Long Island Reo out of business, and forced the liquidation of Long Island Reo. The release by White Motor of all its claims as a creditor of Long Island Reo, amounting to approximately $324,000, in the bankruptcy proceeding, and the additional payment of $100,000 by White Motor to the bankruptcy trustee, reflect an admission of wrongdoing of White Motor against Long Island Reo. (93A) The

claims of Long Island Reo itself and its creditors against the defendants were compromised and settled in the bankruptcy proceeding. However, as shown below, the claims of the plaintiffs against the defendants were not and could not be compromised or settled therein.

The relationship of plaintiff Thomas A. Vincel ("Vincel") to the defendants is especially significant.

Vincel was one of the original partners who, under the name of Long Island Reo Trucking Co., entered into franchise agreements with White Motor beginning in 1959. In 1961, the partners had Long Island Reo, a corporation they had organized, become a party to the franchises for the sale and servicing of Reo trucks, and later of Diamond Reo trucks. (281A) Vincel was an organizer of, the primary investor in, the principal stockholder of, the president of, a director of, and the highest paid employee of Long Island Reo. Until the defendants ousted him of control in November and December 1966, Vincel was the representative of Long Island Reo and its stockholders who was primarily responsible for the arrangements of Long Island Reo with White Motor. (229A, 281A)

White Motor's takeover of management and control of Long Island Reo in November and December 1966 involved threats and

pressure directed against Vincel, as well as against Long Island Reo. Vincel was involved as the president and major stockholder of Long Island Reo, but also personally, in the negotiations that followed White Motor's seizure of the property of Long Island Reo on November 2, 1966. Vincel personally was required to and did, pursuant to the Financing Agreement, guarantee debts of Long Island Reo to White Motor in the principal amount of approximately $196,000. (29A) Pursuant to the Financing Agreement and the Voting Trust Agreement, Vincel personally was required to and did (a) turn over his voting stock to Kommer in exchange for voting trust certificates, and (b) surrender his position as the general manager of Long Island Reo to Samuel B. Antelis, the regional representative of White Motor selected and paid by the defendants to manage Long Island Reo. (285A-290A)

When the defendants took over the management and control of Long Island Reo, they simultaneously acquired control of the economic life of Vincel. His only hope of business and financial survival thereafter resided in the possibility that Long Island Reo would survive and pay off the obligations that Vincel had personally guaranteed.

There were few contractual and fiduciary obligations that the defendants assumed in the Financing Agreement and the Voting Trust Agreement, but those obligations were at the root

of Vincel's hope of business and financial survival. In order for Long Island Reo to continue in business and pay off its debts to White Motor, it was essential that Long Island Reo procure working capital by factoring its inventory of truck parts. Long Island Reo agreed to use its best efforts to procure such financing. White Motor agreed that if Long Island Reo procured such financing, White Motor would release its security interest in the parts inventory of Long Island Reo and would execute all documents required by the financial institution offering the financing. (31A) Without such action by White Motor, Long Island Reo would have no way to procure working capital by factoring its parts inventory or otherwise.

In the Voting Trust Agreement Kommer agreed that during its term he would not cause Long Island Reo or its affiliated corporations to be dissolved, or totally liquidated, or partially liquidated, without having received the prior written consent of Vincel and the other signatories. (42A) The Voting Trust Agreement purports to exempt Kommer from liabilities arising out of the Agreement, but not from liability for such losses or damages as Vincel and the other voting trust certificate holders might suffer by reason of his willful misfeasance or gross negligence. (47A)

Those obligations, limited as they were, were of particular importance to Vincel when he assumed the obligations imposed upon him by the Financing Agreement, turned over his voting stock to Kommer, and surrendered his position as the general manager of Long Island Reo to the nominee of the defendants. Apart from the specific obligations of White Motor and Kommer contained in the two agreements, Vincel became a principal beneficiary of the fiduciary obligations that arose from their assumption of the management and control of Long Island Reo.

Vincel and the other plaintiffs herein lost their entire investments in Long Island Reo as one result of the acts of the defendants complained of herein. The six plaintiffs, including Vincel, who were officers and employees of Long Island Reo suffered additional damage through the loss of their jobs and job-related benefits. The plaintiffs, including Vincel, who were automobile dealers, lost the business they had spent years developing. Vincel suffered particular damage through his guarantee of notes of Long Island Reo payable to White Motor. In this action White Motor has asserted claims against Vincel, which have not been dismissed by the court below, of more than $839,000, including $153,033.71 based on his guarantee of notes of Long Island Reo to White Motor, and $459,832.25 based on debts of Long Island Reo

allegedly owed to White Motor when the Financing Agreement was executed. (78A-80A, 82A-83A) The judgment appealed from would wipe out the claims of the plaintiffs against both defendants, but not the claims of White Motor against Vincel.

The 1972 memorandum and order of the court below relies heavily upon Niles v. N.Y.C. & H.R.R.R., 176 N.Y. 119 (1903), setting forth the general rule that for an injury to a corporation, (a) absent any special duty of the defendants to the plaintiffs, and (b) absent any special loss suffered by the plaintiffs, only the corporation may sue. (195A) In that case the court was dealing with a claim of stockholders against an outsider who had allegedly damaged the corporation alone, and who had no distinct relation to the stockholders as such. The stockholders had suffered no damage other than the loss of value of their stock. Here the defendants held the controlling stock of Long Island Reo, and imposed an employee of White Motor as the general manager of Long Island Reo. By taking over the management and control of Long Island Reo, they assumed fiduciary obligations to all the plaintiffs as beneficial owners of the stock of Long Island Reo, as well as specific obligations to the three plaintiffs who were parties to the agreements and beneficiaries of the express trust created thereby. This action is based upon the defendants' breach of the distinct obligations which they owed directly to the plaintiffs, apart from

whatever obligations they also owed to the corporation.

Stockholders may maintain an action in their own right, even though the corporation may also have a cause of action growing out of the same wrong, where the defendants have violated a special duty owed by them directly to the stockholders.

Ritchie v. McMullen, 79 Fed. 522 (6th Cir. 1897) cert. denied 168 U.S. 710 (1897)

General Rubber Co. v. Benedict, 215 N.Y. 18 (1915)

Eden v. Miller, 37 F. 2d 8 (2d Cir. 1930)

Buschmann v. Professional Men's Association, 405 F. 2d 659 (7th Cir. 1969)

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Kono v. Roeth, 237 App. Div. 252 (1st Dept. 1932)

Keating v. Hammerstein, 125 Misc. 334 (Sup. Ct. 1921)

Blakeslee v. Sottile, 118 Misc. 513 (Sup. Ct. 1922)

Kornfoerfer v. National Bank, 21 N.Y. Supp. 2d 987 (Sup. Ct. 1939)

In Ritchie v. McMullen, supra, the Circuit Court of Appeals held that a stockholder may recover directly for the loss of value of his stock where the injury, although done to the corporation, was a breach of the wrongdoer's duty to the stockholder. The opinion of Judge (subsequently Chief Justice) Taft states (79 Fed. at 538):

> "It is undoubtedly true, as the circuit court held, that a stockholder, merely as such, cannot have an action in his own behalf against one who has injured the corporation, however much the wrongful acts have depreciated the value of his shares.* * * But we are of opinion that this principle has no application where the wrongful acts are not only wrongs against the corporation, but are also violations by the wrongdoer of a duty arising from contract or otherwise, and owing directly by him to the stockholders."

General Rubber Co. v. Benedict, supra, quotes with approval (215 N.Y. at 21-2) the rule as stated by Judge Taft, and sustains the complaint of a corporate stockholder, against one of its directors, for injuries caused to a subsidiary company.

The opinion of the New York Court of Appeals, written by Judge Cardozo, states (215 N.Y. at 21, 22, 23-4):

> "The defendant was not a director of the subsidiary company. He was a director of the plaintiff. Because of that relation he owed to the plaintiff the duty of good faith and vigilance in the preservation of its property. The

duty and the breach, coupled, it is here alleged, with damage, make out a cause of action.

* * *

"The stockholder happens to be itself a corporation; the defendant happens to be a director; but the legal problem would be the same if the plaintiff were a natural person, and the defendant an executor or trustee. It would also be the same if the plaintiff, instead of being substantially the sole stockholder, were one stockholder among many.

* * *

"It is strongly argued, however, that the defendant is answerable for the same wrong to the subsidiary company, and is thus exposed to the risk of a double liability. We think the wrong to the plaintiff does not cease to be remediable because it may also be a wrong to someone else. If the defendant has violated any duty to the subsidiary company, it is not the same duty that he owes to the plaintiff. He is not liable to the subsidiary company qua director. He is not liable to that company for mere neglect. He is liable to it, if at all, only as a stranger might be liable. If he has joined in a conspiracy to plunder it, he must, like any other tort feasor, make compensation for the plunder * * * It is not for us at this time to say to what extent the duties are coterminous. It is enough that they have a different origin, a different standard, and a different measure."

A minority of the court in General Rubber sought to limit Ritchie v. McMullen to a showing of direct and peculiar injury to the plaintiff (215 N.Y. at 32-3). The opinion of Judge Cardozo, however, represents the prevailing view. Moreover, in this action there are claims of direct and peculiar injury to six of the plaintiffs, as well as claims of obligations running directly from the defendants to all the plaintiffs.

In Parascandola v. National Surety Co., 249 N.Y. 335 (1928), an administrator and his surety were held liable to an estate for the reduced value of corporate stock held by the administrator in trust for the estate, resulting from his misappropriation of corporate assets. The fact that the corporation itself had obtained an unsatisfied judgment against the administrator for the same misappropriation of corporate assets was no bar to an action against him and the surety on behalf of the estate, to recover the reduced value of the stock due to his wrongdoing.

In Eden v. Miller, 37 F. 2d 8 (2d Cir. 1930), this Court ruled that a stockholder's right to maintain a personal action against a third person may be unaffected by his corporation's right of action for the same wrong. It appeared from the complaint, dismissed by the district court, that the defendant had agreed with the plaintiffs to provide the corporation with $60,000

as working capital and to use his best efforts to obtain business for the corporation. The plaintiffs agreed to, and did, organize the corporation, provide it with $40,000 as working capital, enter its employ, and devote their best efforts to its management and operation, all in reliance on the broken promises of the defendant.

This Court assumed, without deciding, that the corporation had a right of action for the recovery of such damages as it had sustained, but held that the plaintiffs had an independent right of action, reversing the district court decision and stating (37 F. 2d at 10):

> "For such damage as they can prove, they may recover, regardless of any cause of action the corporation may have against the defendant."

In Buschmann v. Professional Men's Association, 405 F. 2d 659 (7th Cir. 1969), Buschmann, like Vincel in the instant case, had guaranteed indebtedness of a corporation in which he held stock, and which the defendant controlled. The complaint, dismissed by the district court, charged that the defendant had breached an implied promise to Buschmann not to prevent the corporation from paying the indebtedness, and an express promise to Buschmann not to liquidate the corporate business. Buschmann conceded that the corporation had a cause of action against the

defendant for the same acts. The court reversed the judgment of the district court and upheld the complaint, stating (405 F. 2d at 663):

> "Notwithstanding the fact that the corporation has a cause of action against the defendant for mismanagement, Buschmann has a personal cause of action against the defendant to recover damages for breach of the contract, even though the corporate cause of action and Buschmann's cause of action result from the same wrongful acts. The defendant made promises directly to Buschmann the breach of which gave rise to a cause of action. Buschmann's cause of action is manifestly personal and not derivative since his liability to pay the corporation's indebtedness to the Bank, which is his principal item of damage, does not arise from his status as a stockholder of the corporation."

In the 1972 memorandum and order, the court below tried to distinguish Ritchie, General Rubber, and other cases cited above, on the theory that all the acts complained of directly and primarily affected Long Island Reo, and damaged the plaintiffs only to the extent of and by reason of their interests in Long Island Reo. (213A) That theory is not consistent with the facts pleaded in the amended complaint, and fails to meet the holdings of the relevant cases. In General Rubber, for example, all the wrongs charged were committed against the subsidiary corporation. General Rubber was damaged only to the extent of and by reason of its stock interest in the subsidiary corporation. The question here is not whether the acts of the defendants directly affected

the interests of Long Island Reo, but whether those acts were committed in violation of obligations owed by the defendants directly to the plaintiffs. That question must be answered in the affirmative.

In the 1972 memorandum and order the court below states that each plaintiff had been allegedly damaged as one of the group of stockholders, with every stockholder damaged precisely in proportion to his stock interest, and only because of the damage to the corporation. (215A) The amended complaint makes it clear that six of the plaintiffs were damaged disproportionately to their stock interests, because of their special relationship to Long Island Reo as officers and employees, and that Vincel in particular suffered special damages as a result of his personal guarantees of notes of Long Island Reo to White Motor. (229A, 235A)

In the 1972 memorandum and order the court below states that in the original complaint there is no claim that any special provisions of the Voting Trust Agreement, or the Financing Agreement, had been violated. (215A) The amended complaint sets forth specific provisions of both agreements that were violated by the defendants. (235A, 237A)

The 1974 memorandum and order of the court below summarizes the obligations of Long Island Reo to White Motor set forth in the

Financing Agreement, but essentially ignores the obligations of White Motor, also set forth therein, which run to the three plaintiffs who were parties to that agreement as well as running to Long Island Reo. It construes the heart out of the obligations of White Motor to those three plaintiffs set forth in the Voting Trust Agreement. It totally ignores the fiduciary obligations of White Motor and Kommer to the plaintiffs that arose from their assumption of the management and control of Long Island Reo.

The fact that Kommer as trustee had no occasion to vote the stock of Long Island Reo is irrelevant to the claim of the plaintiffs. Section 4 of the Voting Trust Agreement (42A) does not mention the word "vote", and is a flat commitment that the trustee "will not cause any of the corporations to be dissolved or totally or partially liquidated without having received the prior written consent of the signatories". That language must be interpreted consistently with the trustee's express power, in Section 8 of the Voting Trust Agreement (44A) to "cause L.I. Reo's Board of Directors to appoint a person acceptable to him to act as L.I. Reo's General Manager". Kommer and White Motor were able to, and did, cause that appointment, in February 1967, without a vote. In August 1967 Kommer and White Motor were able to and did cause Long Island Reo to be totally liquidated, also without a vote, and without the prior written consent of the signatories.

The action taken in February 1967 was expressly permitted by the Voting Trust Agreement. The action taken in August 1967 was expressly prohibited thereby.

The action taken by Kommer and White Motor in August 1967 constituted "willful misfeasance" on their part. Section 14 of the Voting Trust Agreement (47A) does not create the liability of the defendants to the plaintiffs for such willful misfeasance, but makes it clear that their liability to the plaintiffs for their willful misfeasance is in no way limited by the Voting Trust Agreement.

When the plaintiffs delivered 85% of the voting stock of Long Island Reo to Kommer pursuant to the Financing Agreement and the Voting Trust Agreement, and when three of the plaintiffs and Long Island Reo signed the Financing Agreement, White Motor acquired control of Long Island Reo and of the plaintiffs' business interests and investments in stock of the corporation. White Motor was the major creditor of Long Island Reo, secured by title to or liens on all the trucks and parts on the premises of Long Island Reo.

When Antelis was appointed (a) by White Motor as its regional representative, and (b) at the direction of Kommer as the general manager of Long Island Reo, White Motor also assumed the management of Long Island Reo.

Whether or not White Motor and Kommer so intended, they had become the dominant and controlling stockholders of Long Island Reo and fiduciaries for the plaintiffs, who were the beneficial owners of the voting stock held by White Motor and Kommer and the owners of the other shares outstanding.

As stated by the United States Supreme Court in Pepper v. Litton, 308 U.S. 295, 306 (1939):

> "He who is in such a fiduciary position cannot serve himself first and his cestuis second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. * * * He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandisement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis."

In Southern Pacific Co. v. Bogert, 250 U.S. 483 (1919), the Supreme Court said (at 487-8):

> "The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors."

See also Kavanaugh v. Kavanaugh Knitting Co., 226 N.Y. 185, 195 (1919):

> "Equity, at least, recognizes the truth that the stockholders are the proprietors of the corporate interests and are ultimately the only beneficiaries thereof. Those interests are, in virtue of the law, intrusted, through the corporation, to the directors and from that condition arises the trusteeship of the directors with the concomitant fiduciary obligations.
>
> * * *
>
> When a number of stockholders constitute themselves, or are by the law constituted, the managers of corporate affairs or interests they stand in much the same attitude towards the other or minority stockholders that the directors sustain, generally, towards all the stockholders, and the law requires of them the utmost good faith."

In Farmers' Loan & Trust Co. v. N. Y. & N. Ry. Co., 150 N.Y. 410 (1896), minority stockholders of the railway company objected to foreclosure of a second mortgage on the corporate property where another railroad company (New York Central) had acquired a majority of the stock and a majority of the second mortgage bonds of the railway company. Like White Motor in the instant case, New York Central had acquired operating control of the railway company and was also the principal creditor. New York Central caused an action to be brought to foreclose the second mortgage, for the purpose of obtaining control of the

railway company's property and franchises.

The foreclosure action, like the State court action of White Motor herein, was based upon defaults allegedly caused by the controlling stockholder. In the foreclosure action the trial court rejected evidence offered by the minority stockholders to show that New York Central had caused the defaults. The judgment of foreclosure and sale was affirmed below, but was reversed by the Court of Appeals.

The court ruled that New York Central, as the controlling stockholder of the railway company, owed a duty to the minority stockholders, that the law implied a quasi trust upon its part, and that it would have no right to cause a default on the second mortgage and then cause the mortgage to be foreclosed. 150 N.Y. at 434.

Here too the plaintiffs are entitled to a trial of their claim that White Motor and Kommer misused their management and control of Long Island Reo to cause the defaults that they used, in the State court action, as a pretext for seizing the corporate property and terminating the corporate business, to the damage of the plaintiffs who were their cestuis que trustent. The plaintiffs have a right of action for that breach of trust,

- in addition to their rights of action for breaches of the defendants' obligations to them set forth in the Financing Agreement and the Voting Trust Agreement, whatever rights of action Long Island Reo may also have had.

POINT II

The claims of the plaintiffs against the defendants were not wiped out in the bankruptcy proceeding of Long Island Reo.

Formal claims of wrongdoing by the defendants were first asserted in the New York State Supreme Court action that the defendants instituted against Long Island Reo on August 25, 1967 (bringing in Vincel as a defendant on September 1, 1967), and used to cause the liquidation of Long Island Reo and the termination of its business. The defendants, with Kommer acting for White Motor, obtained an ex parte order of attachment pursuant to which they caused the sheriff to seize and attach the property of Long Island Reo, destroying its business and compelling its liquidation.

In that action Long Island Reo and Thomas A. Vincel counterclaimed for damages against White Motor and Kommer, based upon their breach of obligations owed to Vincel and to the corporation. Long before the State court action could be tried, the seizure of the property and cancellation of the franchise of Long Island Reo by White Motor compelled Long Island Reo to seek the protection of a bankruptcy court, so that the liquidation caused by the defendants would be carried

out in an orderly fashion. At that point (December 21, 1967) it would have been futile to seek a reorganization of Long Island Reo. (300A)

In the bankruptcy proceeding, White Motor filed claims as a creditor of Long Island Reo in excess of $320,000. By way of defense and counterclaim, the bankruptcy trustee, on behalf of the estate and the creditors whom he represented, asserted against White Motor some of the wrongdoing that had previously been charged by Long Island Reo and by Vincel against White Motor and Kommer in the State court proceeding. (88A, 99A)

The controversy between White Motor and the bankruptcy trustee was compromised in the bankruptcy proceeding. White Motor withdrew its claims as a creditor, and delivered to the bankruptcy trustee a certified check for $100,000. The court order approving the compromise expressly provides for a stipulation discontinuing the State court action, but not in any way affecting the action of White Motor against Vincel, or Vincel's defenses and counterclaims. (92A)

Stipulations thereafter provided for dismissal of the action pending in the New York State Supreme Court, with prejudice as between White Motor and Long Island Reo, but

without prejudice as between White Motor and Vincel. (117A, 385A)

The compromise and settlement provided enough cash, once the claims of White Motor had been withdrawn, for the bankruptcy trustee to pay all administration expenses including $36,722 allowed for the bankruptcy trustee and his counsel, to pay the claims of secured creditors ($3,879) in full, and to pay approximately 70% ($95,692) on the claims of unsecured creditors. (300A-301A)

The claims of stockholders of Long Island Reo asserted in this action were not made or considered in the bankruptcy proceeding, except that the claims of Vincel that had theretofore been asserted against White Motor and Kommer in the State court proceeding were expressly kept alive, along with the claims of White Motor against Vincel. The 1974 memorandum and order of the court below would leave alive the claims of White Motor against Vincel, but would extinguish his claims, and the claims of the other stockholders of Long Island Reo, against White Motor and Kommer.

As shown above, the plaintiffs are suing in this action for the willful violation by the defendants of contractual, fiduciary, and statutory obligations of the defendants to the

plaintiffs. The plaintiffs claim damages for the breach of duties owed directly to them, which were not and could not be asserted, litigated, or compromised by the bankruptcy trustee. The bankruptcy trustee could and did compromise the claims of creditors of Long Island Reo arising from the wrongs done by White Motor to Long Island Reo. He could not and did not purport to compromise the claims of the plaintiffs in this action for the wrongs done to them by White Motor and Kommer.

Pursuant to Sections 2a (17) and 44 of the Bankruptcy Act, 11 U.S.C. §§ 11a (17) and 72, the bankruptcy trustee is normally appointed by the creditors themselves. Only if the creditors do not appoint a trustee, or if the trustee so appointed fails to qualify, does the bankruptcy court make the appointment.

The bankruptcy trustee is vested with the bankrupt's title to property pursuant to Section 70a of the Bankruptcy Act, 11 U.S.C. §110a, but only for limited purposes:

> "The trustee, however, is vested with the bankrupt's title only for the purposes of administration and distribution of the estate among the bankrupt's creditors. In this activity, as previously discussed, the trustee primarily represents the creditors themselves and, in a secondary and restricted sense, the bankrupt as well." 4A Collier on Bankruptcy ¶70.04, pp. 51-2.

In no sense is the bankruptcy trustee, in an ordinary bankruptcy proceeding, a representative of the stockholders. He has neither the powers nor the duties of a trustee in a Chapter X proceeding.

In Schmitt v. Jacobson, 294 F. Supp. 346 (D. Mass. 1968), the court considered a motion of the defendants for summary judgment on three counts of a complaint filed by a bankruptcy trustee against directors of the bankrupt corporation. Two of the three counts alleged breaches of obligation of the defendants to the bankrupt corporation. As to those counts the motion for summary judgment was denied, the court holding that where directors mismanage a corporation, and it becomes bankrupt, the trustee in bankruptcy succeeds to the corporation's claim against the directors. 294 F.Supp. at 348.

The other count considered alleged a failure of the defendants to disclose certain facts to creditors and stockholders. As to that count the defendants' motion for summary judgment was granted. The court held (294 F. Supp. at 347):

> "Insofar as plaintiff, who sues solely as a trustee in bankruptcy, seeks to present claims belonging to stockholders the complaint is without merit. A trustee in bankruptcy cannot recover on behalf of the bankrupt's stockholders. United States v. Jones, 229 F. 2d 84, 58 A.L.R. 2d 778 (10 Cir., 1955); Greene v. R.F.C., 100 F. 2d 34 (1st Cir., 1938)."

In United States v. Jones and in Greene v. R.F.C., cited above, United States Courts of Appeals ruled that State statutes requiring the consent of stockholders to the execution of a valid mortgage on real or personal property were intended for the protection of stockholders. Both cases hold that a trustee in bankruptcy is the representative of the corporation and of its creditors, but not of its stockholders, and therefore has no standing to question the validity of mortgages that did not have the required consent of stockholders. The opinion of the court in Greene states (100 F. 2d at 37):

> "The decree of the District Court must be affirmed for the reason that the trustee in bankruptcy, as the representative of the creditors or of the corporation, cannot question the validity of the mortgages."

The court below cites Schmitt v. Jacobson, supra, but fails to note the vital distinction between the corporate claims that the bankruptcy trustee can assert and compromise and the claims of individual stockholders, or of stockholders collectively, that he cannot reduce to his possession, settle, compromise, or release. (407A-408A)

The other cases there cited by the court below are altogether consistent with Schmitt v. Jacobson, supra. Rood v. Bayliss, 424 F. 2d 142 (4th Cir. 1970) holds that

corporate officers and directors, who surreptitiously withdrew from the corporation which became bankrupt funds that they were obligated to leave in the corporation, held the withdrawn funds in trust for the corporation, and further states (424 F. 2d at 146):

> "A trustee in bankruptcy represents and stands in the place of the bankrupt itself and can enforce rights of action which the bankrupt could have enforced."

Graybar Electric Co. v. Doley, 273 F. 2d 284 (4th Cir. 1959) holds that a single creditor of a corporation which has gone through bankruptcy has no standing to sue on a contract of stockholders to make loans to the corporation. The court finds no evidence that the contract was made for the benefit of the plaintiff creditor, who had participated in the bankruptcy proceeding and received distributions from the estate. The court states (273 F. 2d at 292) that the contract might constitute an asset of the corporation available pro rata for all unsecured creditors, but holds that,as a corporate asset, it could be realized upon only by the trustee in bankruptcy or his successor.

Similarly Stephan v. Merchants' Collateral Corp., 256 N.Y. 418 (1931), holds that after a corporation has gone through bankruptcy an individual stockholder may not maintain a derivative

action in the right of the corporation. The right of action of the corporation had passed to the trustee in bankruptcy, and could not be asserted by the corporation, or by a stockholder on its behalf, unless the trustee in bankruptcy had knowingly elected not to accept it.

Here the plaintiffs have brought an action for damages they suffered by the defendants' violation of obligations running directly to the plaintiffs. This is not a derivative or even a representative suit, and the plaintiffs' rights of action were never an asset of Long Island Reo. The trustee in bankruptcy did not purport to and had no power to compromise the plaintiffs' rights of action against the defendants.

Even the trustee's power to compromise claims of the bankrupt corporation itself, with the approval of the court, has its limits. As stated in 2 Collier on Bankruptcy ¶27.02, pp. 1085-6:

> "... a compromise cannot affect the rights of creditors of a bankrupt corporation who refuse to accept the compromise, to sue in a state court to enforce liability for their claims against the officers of the corporation."

Collier cites Hamilton-Brown Shoe Co. v. Berwald Shoe Co., 10 F. 2d 275 (5th Cir. 1926), cert. denied 271 U.S. 670 (1926). In that case certain unsecured creditors had sued officers of the bankrupt corporation in a state court, to hold

the officers personally liable to them for fraud in inducing them to advance credit to the corporation. With regard to those causes of action, the court held that the trustee in bankruptcy was not authorized to represent the plaintiffs and could not compromise their claims. Since the plaintiffs had not submitted themselves to the jurisdiction of the bankruptcy court with regard to their lawsuits, the court was without jurisdiction to bind them to the compromise negotiated by the trustee in bankruptcy.

Here too the plaintiffs' claims (unlike the claims of Long Island Reo) against the defendants were not submitted to the bankruptcy court. That court had no jurisdiction to approve a compromise of the plaintiffs' claims, but in any event the trustee in bankruptcy did not purport to compromise the plaintiffs' claims.

For the reasons stated above, the claims of the plaintiffs against the defendants survive the bankruptcy proceeding of Long Island Reo.

POINT III

Plaintiffs Thomas A. Vincel, Nuno Tardo, and William Green were "automobile dealers" within the meaning of the Automobile Dealers' Franchise Act (15 U.S.C. §§ 1221-1225), were "Distributors" and "Dealers" within the meaning of Section 19 of the General Business Law of the State of New York, and have a Statutory cause of action against White Motor for the termination of their franchises.

Section 1221(c) of the Automobile Dealers' Franchise Act (also known as the Automobile Dealers' Day in Court Act) defines an "automobile dealer" as "any person * * * operating under the terms of a franchise and engaged in the sale or distribution of * * * trucks." It does not require an automobile dealer to be a party to the franchise, or to be named therein, but merely to be operating under its terms and to be engaged in the sale or distribution of trucks.

An "automobile manufacturer" is defined in 15 U.S.C. §1221(a) to include a manufacturer of trucks, such as White Motor.

A "franchise" is defined in 15 U.S.C. §1221(b) as "the written agreement or contract between an automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties

to such agreement or contract."

Plaintiffs Thomas A. Vincel, Nuno Tardo, and William Breen were clearly operating under the terms of a series of franchise agreements, and were clearly engaged in the sale and distribution of Reo trucks and Diamond Reo trucks pursuant to those franchises. They were more than mere stockholders of a corporate dealer.

Plaintiffs Vincel and Tardo were two of the three original partners who began the dealership in 1959. Plaintiff Breen succeeded to the interest of the third original partner, Henry Lanz, when Lanz left the business in 1964. (281A)

In 1960 the partners organized Long Island Reo as a mechanism for expanding and financing the dealership and facilitating minority investments, voting and non-voting, by relatives and associates. Between 1961 and November 1966 the written agreements with White Motor were made in the name of Long Island Reo. Plaintiffs Vincel and Tardo, first with Lanz and then with plaintiff Breen, were the officers, directors, and controlling stockholders of Long Island Reo, who made all the arrangements with White Motor and who managed the dealership.

The controversy that erupted in November 1966, with White Motor's first move toward cancellation of the franchise, was temporarily resolved by supplementing the standard dealer selling agreement between Long Island Reo and White Motor with the Financing Agreement and the Voting Trust Agreement. Plaintiffs Vincel, Tardo, and Breen were parties to the Financing Agreement along with Long Island Reo and White Motor, and were parties to the Voting Trust Agreement along with Kommer, who acted as White Motor's employee and designee. Plaintiff Vincel besides signing the two agreements personally guaranteed a 6 1/2% note of Long Island Reo to White Motor in the principal amount of approximately $196,000. (288A, 29A)

The Financing Agreement starts with a release and discharge by White Motor of Long Island Reo and of plaintiffs Vincel, Tardo, and Breen, and a release and discharge by Long Island Reo and plaintiffs Vincel, Tardo, and Breen of White Motor, its divisions, successors and assigns, from all actions, causes of action, claims and demands other than those contained in and collateral to the Financing Agreement, other than a 1965 note of Long Island Reo to White Motor on which a balance of $18,180 was due. (24A-25A) In February 1967, plaintiff Vincel guaranteed another note of Long Island Reo to White

Motor in the principal amount of approximately $43,000. (80A, 150A, 172A-173A)

By February 1967, White Motor and Kommer had assumed the management as well as the control of Long Island Reo. White Motor's designee and employee Kommer held 85% of the voting stock. White Motor was the major creditor, holding title to or liens on all the trucks and parts on the premises of Long Island Reo. Samuel Antelis, an employee and regional representative of White Motor and the designee of Kommer, was the general manager of Long Island Reo. Plaintiffs Vincel, Tardo, and Breen continued their engagement in the sale and distribution of trucks manufactured by White Motor, operating under the terms of the franchise and as parties to vital elements of the franchise.

As in Kavanaugh v. Ford Motor Co., 353 F. 2d 710 (7th Cir. 1965) the franchise for the Diamond Reo dealership in Queens, Nassau, and Suffolk Counties was not limited to a single document. It was a complex arrangement for the sale, distribution, and servicing of those trucks, embodied in three principal documents, and in security agreements (80A, 173A-174A) ancillary thereto, each document constituting an inseparable part of the mutual understanding among the

parties. The court stated in Kavanaugh v. Ford Motor Co. (353 F. 2d at 715):

> "We do not think that the word 'franchise' as used in the Act need be restricted to a single-document. If other written agreements are so interwoven with the documents ostensibly designated as the franchise as to affect materially the legal significance of the latter, they must be regarded as part of the franchise agreement".

The court below in the 1974 memorandum and order misconstrues Kavanaugh v. Ford Motor Co. when it states that the case "does not contribute to plaintiffs' contention". (412A) It fails to recognize that Vincel, Tardo, and Breen were, along with Long Island Reo, parties to some of the franchise agreements, operating under the terms of the franchise, and engaged in the sale and distribution of trucks manufactured by White Motor.*

Plaintiffs Vincel, Tardo, and Breen exemplify the class of persons on whose behalf the Automobile Dealers' Day in Court Act and Section 197 of the New York General Business Law were enacted. We submit that they are included in any reasonable definition of the term "automobile dealer". "Whatever may have been the relationship between these parties, the term 'automobile dealer' is to be given the construction that best serves the Congressional purpose of 'supplementing

* The Court below also fails to recognize that here, as in Kavanangle, the manufacturer had taken over control of the corporation dealer, and also the management of the corporation dealer.

the antitrust laws', and balancing 'the power . . . heavily weighted in favor of automobile manufacturers', 70 Stat. 1125 (1956), (see title of Act)." Lewis v. Chrysler Motor Corp., 456 F. 2d 605, 607 (8th Cir. 1972). Also see Kavanaugh v. Ford Motor Co., supra, and York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., 447 F. 2d 786 (5th Cir. 1971).

Section 197 of the General Business Law of the State of New York provides:

> §197. Termination of contracts for sales of motor vehicles
>
> No manufacturer or distributor, or any agent of such manufacturer or distributor, shall terminate any contract, agreement, or understanding or renewal thereof for the sale of new motor vehicles to a distributor or dealer, as the case may be, except for cause.

We submit that the arguments contained above in reference to the status of plaintiffs Vincel, Tardo, and Breen under the Automobile Dealers' Day in Court Act apply equally to the cause of action based upon Section 197.

Both statutes were enacted for the purpose of balancing the power of, and giving the automobile or truck dealer a fair chance against, a manufacturer who possessed overwhelming economic power. Plaintiffs Vincel, Tardo, and

Breen were "distributors" and "dealers" within the meaning of Section 197, as they were "automobile dealers" as defined in the federal statute. They are entitled to a trial of their claims set forth in the 5th and 6th causes of action of the amended complaint.

CONCLUSION

The plaintiffs have established their right to a trial of their claims against the defendants. The judgment of the court below, dismissing the plaintiffs' action on the merits, should be reversed, and the case remanded for trial.

Respectfully submitted,

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Service of 2 copies of this within
Brief is admitted this
16th day of December 1971, 2:30 P.M.

Kenny + McGrath
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By Mary M. Bateman